IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

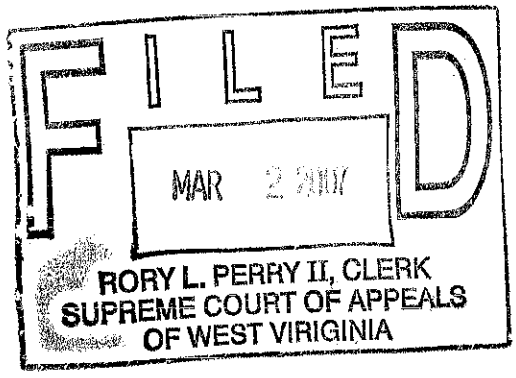
STATE OF WEST VIRGINIA,
Appellee,

v.

ERIC DELBERT JETT,
Appellant.

Supreme Court No. 33198

Circuit Court No. 04-F-380
(Kanawha)



APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

I. ATTEMPT IS A WORD OF ART IN THE LEGAL PROFESSION AND AN ELEMENT OF THE CRIME WHICH THE TRIAL COURT SHOULD HAVE DEFINED (Reply to State's Brief 20-21)

The State argues that it was not necessary for the trial court to define attempt as the everyday definition of attempt is "widely used and ...is readily comprehensible to the average person without further definition or refinement", *State's Brief 21 (citation omitted).* There is no disputing that the word "attempt" holds a special meaning in the legal profession, that is far more complex than the everyday definition. In fact this Court took the time to specify exactly what was necessary to constitute the crime of "attempt" in West Virginia in *Syl. Pt. 4, State v. Mayo, 191 W.Va. 79, 443 S.E.2d 236 (1994):*

> "In order to constitute the crime of attempt, two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime." (citation omitted)

This legal definition demonstrates why it was so important for the trial court to ensure that the jurors, in Eric's case, understood the meaning of the word "attempt" which holds a completely different and more complex meaning in the legal system. The State's argument that many statutes in West Virginia do not define the word attempt is meritless because in order to prove attempt under any of the statutes listed in the State's brief would require the production of evidence which would satisfy this Court's definition of attempt listed above.

Additionally, the State argues that because W.Va. Code § 60A-4-411(2003) (2005 Repl. Vol.) criminalizes both operation and the attempt to operate a clandestine drug lab there is no underlying offense and there is no need for a court to differentiate between the two. *State's Brief 18* This could not be further from the truth. First of all "attempt" alone is not a crime. There always has to be an underlying offense to an "attempt" and in this situation the underlying

offense is the "operation of a clandestine drug lab." Even though W.Va. Code § 60A-4-411 criminalizes both the operation and the attempt to operate a clandestine drug lab within the same statute that does not relieve the trial court of its obligation to properly instruct the jury on all the essential elements of both of the offenses found within the statute. This is particularly true in Eric's case as, based on the evidence produced at trial the State's case rested on the "attempt to operate" portion of the statute. Therefore the jury being instructed as to the legal definition of "attempt" as defined by this Court was critical to a proper charge to the jury.[1]

II. DEFENSE COUNSEL'S REQUESTED JURY INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW. THE ASSEMBLY OF CHEMICALS AND/OR EQUIPMENT WITH THE INTENT TO MANUFACTURE METHAMPHETAMINE DOES NOT CONSTITUTE ATTEMPT TO OPERATE A CLANDESTINE DRUG LAB UNDER W.Va. Code § 60A-4-411 (Reply to State's Brief 15, 17)

The state argues that once it is established, at trial, that a clandestine drug lab exists an "attempt to operate" a clandestine drug lab has been proven. The state argues, "[w]hen one goes out and accumulates the chemicals and/or equipment necessary to manufacture methamphetamine he has taken an overt step toward the process and a jury could find that the individual had in fact attempted to operate a clandestine drug lab."[2] *States Brief 17* Thus, the

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[1] The State argues that the jury may possibly find that there was a combination of both operation and attempt to operate and find the defendant guilty. The legislature criminalized "operation" and "attempt" therefore the possibility that the State refers to should not happen if a jury is properly instructed as to the meaning of "operate" and "attempt to operate." In this argument the State is conceding that without further definition of the "words of art" within W.Va. Code § 60A-4-411 there is a great possibility that a jury will be confused and that the State benefits from this confusion.

[2] Interestingly, the State, in it's brief, argues that the trial court had no obligation to define "attempt" to the jury, as it was not a "word of art" and its common definition was readily understood by the average person. *State's Brief 21* However, when arguing in its brief that the collection of chemicals and/ or equipment was enough to establish "attempt" under W.Va. Code §60A-4-411 the State relied on the legal definition of attempt. *State's Brief 17*

State asserts that defense counsel's requested instruction - that if a defendant merely possess chemicals and/or equipment for the purposes of manufacturing methamphetamine, but committed no overt act in the manufacturing process he must be found not guilty - is not a correct statement of the law. *States brief 15* The State's argument is incorrect.

W.Va. Code § 60A-4-411(a) states: "[a]ny person who **operates or attempts to operate** a clandestine drug lab is guilty of a felony..." *(emphasis added)* In subsection (b) of W.Va. Code § 60A-4-411, the legislature defines "clandestine drug lab" as: "....any property real or personal on or in which a person assembles any chemicals or equipment or combination thereof for the purposes of manufacturing methamphetamine...." The legislature's definition of a "clandestine drug lab" establishes that the legislature drafted the statute to require proof beyond the mere assembly of chemicals and/or equipment with the intent to manufacture methamphetamine to satisfy a conviction of "attempt to operate a clandestine drug lab" *W.Va. Code § 60A-4-411(b)* Therefore, the State's argument gives no meaning to the words "attempt to operate" in the statute. The State must produce evidence beyond the existence of a clandestine drug lab to obtain a conviction under W.Va. § 60A-4-411. The plain meaning of the words in the statute requires it. *State v. Elder 152 W.Va. 571,575, 165 S.E.2d 108,111 (1968), Syl. Pt. 1 Appalachian Electric Power Co. v. Koontz, 138 W.Va. 84, 76 S.E.2d 863 (1953).* Defense counsel's instruction was therefore a correct statement of the law and the trial court's refusal to give it was plain error.

III. THE STATE FAILED TO ADDRESS THE FACT THAT A DEFENDANT IS ENTITLED TO AN INSTRUCTION ON HIS THEORY OF DEFENSE.

Justice Cleckley wrote: "[a] criminal defendant is entitled to an instruction on the theory of his or her defense if he or she offered a basis in evidence for the instruction, and the instruction

has support in the law." *State v. Hinkle 200 W.Va.280,285, 489 S.E.2d 257,262 (1996) citing State v. LaRock, 196 W.Va. 294,308, 470 S.E.2d 613, 627 (1996)* Furthermore, in *LaRock* this Court stated that "...failure to instruct a jury on a legally and factually cognizable defense is not subject to harmless error analysis..." *LaRock at 308,627* "This rule means that a defendant generally is entitled to a jury charge that reflects any defense theory for which there is a foundation in the evidence." *Id. (citations omitted)* Eric's theory of defense at trial was that he did not operate or attempt to operate a clandestine drug lab at his residence.[3] The State's brief flatly ignores the necessity for an instruction on this theory of defense.

Defense counsel's proffered instruction furthered Eric's theory of defense. The instruction was an essential part of the trial court's charge to the jury for two reasons: (1) to ensure that the jury held to State to its burden of proving every essential element beyond a reasonable doubt and (2) to ensure that the jury could give full credit to Eric's theory of defense. The trial courts' instruction on the elements of W.Va.Code § 60A-4-411 was misleading and allowed the jurors to find that once the state proved the existence of a clandestine drug lab, Eric was guilty. *Tr. Vol. IV 427-428* Defense counsel argued this point to the court on several occasions. *Tr. Vol. III 408-412* In an attempt to get the essential language in the court's charge, defense counsel requested that the court incorporate the language of the proffered instruction into it's charge if it was not inclined to give the instruction as a whole. *Tr. Vol. III 410* Further explanation of the words "operate" and "attempt," as was found in defense counsel's proffered

[3] Detective Nohe testified at trial that Eric admitted to attempting to cook methamphetamine at his residence. *Tr. Vol. II 198* However, in Detective Nohe's report taken the day of Eric's arrest there is no mention of where Eric attempted to cook. The report states: "He advised that he himself has attempted to cook in the past." *R. 216* Although, this may not seem significant at first glance, this statement comes right after Eric admitted to participating in cooks at someone else's home and taken together with the allegation of possessing portions of a mobile lab at the time of his arrest. The Detective's testimony is questionable.

instruction, would have helped to avoid confusion and ensured that Eric's conviction was based on the letter of the law as written.

The State further argues that defense counsel's requested jury instruction doesn't relate to any facts adduced at trial. *State's Brief 15* To the contrary, defense counsel produced sufficient evidence to support his requested instruction. Eric's wife Natasha testified that during the period of time right before these charges were filed she did not see Eric very often. She testified that Eric would be gone for a period of time, come home, shower, sleep, and leave again. *Tr. Vol. III 361* Natasha also testified that other people besides Eric had access to the basement portion of his home. *Tr. Vol. III 372* Additionally, she testified that the last time Eric was home before charges were filed, he was there for no more than 3 to 4 hours and during that time he was working on his car and he took her to the grocery store. *Tr. Vol. III 362-364* Furthermore, Eric was not even in the State when his house was searched and charges were filed against him. Eric was incarcerated out of state. *Tr. Vol. III 365*

The testimony of Detective Gilbert, one of the investigating officers, further established that the State's case rested on the "attempt to operate portion" of the statute. Detective Gilbert testified that the evidence recovered at Eric's home was not an operational lab when seized. Detective Gilbert verified that officers did not recover a heat source at Eric's home, which he agreed is a necessary piece of equipment to operate a clandestine drug lab.[4] Gilbert also testified that officers did not recover any controlled substance in the evidence seized at Eric's home. (Tr. Vol. III 274). The prosecutor also confirmed this by verifying all of the samples submitted to the

[4] Counsel is not arguing, as the State suggests, *State's Brief 18-19,* that in order to be charged with the operation of a clandestine drug lab a defendant must be caught in the act of cooking. What counsel is arguing is that based on Detective Gilbert's testimony, if someone walked into Eric's basement, as it was found by the officers, **with the intent to cook methamphetamine** it would have been impossible because **essential equipment** to the process was missing.

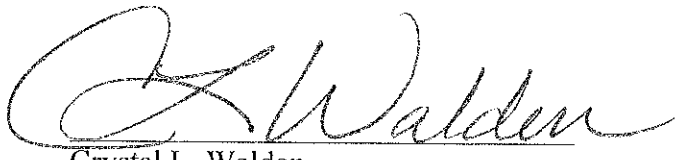
West Virginia State Police Crime Lab from Eric's home came back negative for controlled substances. (Tr. Vol. III 291) The trial court's giving the legal definition of attempt to the jury was a necessity to ensure they could properly apply the law to the facts of Eric's case as presented at trial.

The State's argument that Eric is not entitled to his proffered instruction is wrong. The State spent the majority of it brief listing to this Court all of the things recovered at Eric's home and argued that Eric was not entitled to an instruction that defined "attempt to operate" because of all of the evidence recovered and produced at trial. *State's Brief 16* This argument fails to recognize the jury is the ultimate arbiter of fact. As mentioned above, Eric presented sufficient evidence at trial that supported his theory of defense. Therefore, it should have been left to the jury to apply the law to the facts of Eric's case. Additionally, the State argued that the trial court's refusal to give defense counsel's proffered instruction in no way impeded defense counsel from arguing Eric's theory of defense during closing argument. *State Brief 20* This argument is flawed. A trial serves no real purpose if the trier of fact is not properly instructed as to the law they must apply to the evidence presented. Without proper instruction as to the definitions found within W.Va. Code §60A-4-411(a), the jury had no way to properly apply Eric's theory of defense to the facts of the case even though defense counsel was able to argue it during closing.

RELIEF REQUESTED

For the foregoing reasons, Eric Jett respectfully requests that this Court reverse his conviction and remand his case to the Kanawha County Circuit Court for a new trial.

Respectfully submitted,
ERIC DELBERT JETT
By Counsel



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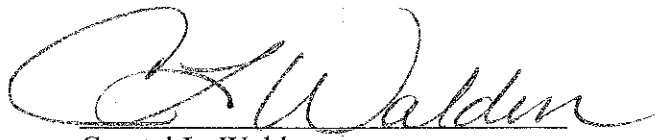
CERTIFICATE OF SERVICE

I, Crystal L. Walden, hereby certify that on the 2nd day of March, 2007, I sent via United States Postal Service a copy of the foregoing Appellant's Reply Brief to Ronald R. Brown, Assistant Attorney General, State Capitol Building 1, Room W-435, 1900 Kanawha Boulevard East, Charleston, West Virginia 25305.



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